

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place: Room 503
Boston, MA 02108
(617) 727-2293

JERROLD LUCAS,
Appellant

v.

D-16-129

NEW BEDFORD SCHOOL DEPARTMENT,
Respondent

Appearance for Appellant:

Phillip Brown, Esq.
AFSCME Council 93
8 Beacon Street
Boston, MA 02108

Appearance for Respondent:

Jane Medeiros Friedman, Esq.
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133 William Street
New Bedford, MA 02740

Commissioner:

Paul M. Stein

DECISION

The Appellant, Jerrold Lucas, appealed to the Civil Service Commission (Commission), pursuant to G.L.c.31,§43 contesting his three-day suspension by the New Bedford School Department (NBSD) from his position as Motor Equipment Operator.¹ A pre-hearing conference was held at the UMass School of Law in Dartmouth on September 23, 2016 and a full hearing was held at that location on February 22, 2016 and March 24, 2016. No party requested a public hearing so the hearing was declared private. The full hearing was digitally recorded and a CD of the recording was provided to the parties.² Nineteen exhibits were received into evidence (Exhs. 1 through 3, 5 through 20) and one document marked for identification (Exh. 4ID). Both parties submitted proposed decisions on February 24, 2017.

¹ The Standard Adjudicatory Rules of Practice and Procedure, 801 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission with G.L. c. 31, or any Commission rules, taking precedence.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal becomes obligated to use the CD to supply the court with the written transcript of the hearing to the extent that he/she wishes to challenge the decision as unsupported by the substantial evidence, arbitrary and capricious, or an abuse of discretion.

FINDINGS OF FACT

Based on the Exhibits entered into evidence and the testimony of the following witnesses:

Called by the Appointing Authority:

- Nancy Carvalho, Supervisor, NBSD Food Service Department
- Heather Emsley, Executive Director of NBSD Human Capital Services

Called by the Appellant:

- Jerrold Lucas, Appellant

and taking administrative notice of all matters filed in the case, pertinent law and reasonable inferences from the credible evidence, a preponderance of evidence establishes these facts:

1. The Appellant, Jerrold Lucas, is a tenured labor service employee with the NBSD who became employed by the NBSD as a Laborer in 2005 and has held his current title of Motor Equipment Operator (MEO) since September 29, 2008. Prior to his employment with the NBSD, Mr. Lucas worked as a Laborer with the City of New Bedford's Department of Public Works from 1993 until July 2003, when he was laid off as part of a reduction in force. His civil service seniority date is February 1, 1993. (*Exhs. AA1, AA2, AA14 & AA16*)

2. Mr. Lucas is one of three full-time MEOs assigned to the NBSD Food Service Division, which prepares and serves approximately 18,000 meals daily, including breakfast and lunch to students at the 32 schools in the NBSD system. (*Testimony of Carvalho*)

3. The meals are prepared at one of the 12 "feeder" schools that have a full cafeteria and the MEOs are responsible to pick up the prepared food from these schools and deliver them to 20 "satellite" schools without a full cafeteria on-site. MEOs also deliver supplies, such as paper goods, to the schools from the NBSD central Administration Building. (*Testimony of Carvalho*)

4. Each Food Service MEO is assigned one of three routes (North, South & Central) and a Laborer to assist him. Mr. Lucas is responsible for nine schools, delivering meals from four (4) feeder schools to five (5) satellite schools. The MEOs work a 6:15 AM to 2:15 PM schedule,

delivering breakfast the day before and lunch on the day it is served. Food Service MEOs are “school year” employees, meaning that they work 181 days a year when school is in session.

(Testimony of Carvalho)

5. Pursuant to the Collective Bargaining Agreement (CBA) between the NBSD and AFSCME Council 93, Local 641, of which Mr. Lucas is a member, he accrues 1.25 sick days per month, or a total of 12.5 days per school year. *(Exh. AA15)*

6. The CBA provides for incentives for employees who do not use up their sick leave, ranging from a \$450 bonus for perfect attendance to a \$200 bonus for using four days of sick leave or less. *(Exh. AA15; Testimony of Emsley)*

7. Employees who exhaust all of their their sick leave accrual may be placed on vacation leave (if available) or leave without pay at the discretion of the NBSD. An employee’s department head may require a physician’s certification in cases of “frequent use of sick leave” or when the employee is suspected of sick leave abuse or medical incapacity. Prior to invoking such a requirement, the employee must be provided a non-disciplinary “Letter of Expectations” These notices advise the employee that he/she must improve his/her attendance but do not set any specific required targets for improvement. *(Exh. AA 15; Testimony of Carvalho & Emsley)*

8. In the four school years prior to the current (2016-2017) school year, Mr. Lucas exhausted his sick leave accruals. His absences included:

<u>School Year</u>	<u>Days Absent</u>	<u>Attendance Rate</u>
2012-2013	53	70.1%
2013-2014	118	34.8%
2014-2015	79	56.3%
2015-2016	71	60.8%

(Exhs. AA17 & AA18ID; Testimony of Emsley)

9. In most cases, the NBSD did not have advance notice of Mr. Lucas’s sick leave requests. Typically, Mr. Lucas would call in sick on the day of his absence and he would be out of work

for a few days at a time. This required the NBSD to reallocate the work between the other two MEOs or ask one of the Laborer assistants to work Mr. Lucas's route alone. (*Exh. AA17; Testimony of Carvalho*)

10. The only exception was in June 2014, when the NBSD knew that Mr. Lucas would be out for an extended period due to an injury and the NBSD was able to hire a retired MEO to cover this absence. (*Exh. AA5; Testimony of Carvalho*)

11. On February 20, 2015, Human Capital Services Director Heather Emsley issued Mr. Lucas a "Letter of Expectations", noting his absence for 32 days so far that school year and stating that the NBSD expected his attendance to improve. The letter also informed Mr. Lucas that, if he was having personal issues, he may be eligible for assistance through the Employee Assistance Program (EAP) or through the Family Medical Leave Act (FMLA). (*Exh. AA5*)

12. As of April 17, 2015, Mr. Lucas had not returned to work, and had been on unpaid leave since February 10, 2015. He previously had been informed that, due to his attendance record, he was ineligible for FMLA leave.³ By letter dated April 17, 2015, Ms. Emsley's assistant, Kelly Benevides, directed Mr. Lucas to contact her or NBSD would assume he abandoned his job. Mr. Lucas thereafter returned to work. He was absent two additional days in May 2015 and seven days in June 2015. (*Exh. AA6, AA 17 & AA18ID; Testimony of Emsley*)

13. By letter dated November 13, 2015, after Mr. Lucas had been absent for 13 days during the 2015-2016 school year, Ms. Benevides sent Mr. Lucas a new "Letter of Expectations", again informing him that NBSD expected his attendance to improve. (*Exh. AA7*)

14. By letter dated March 8, 2016, the NBSD Food Services Supervisor, who was Mr. Lucas's direct boss, issued him a written warning. The letter noted that after he received his

³ The FMLA requires that an employee work a minimum of 1,250 hours in the preceding 12 months to be eligible. 29 USC §2601 et seq. .

November 13, 2015 Letter of Expectations, he had been absent for an additional 41 days, making a total of 54 days out of 113, or an attendance rate of 48%. Ms. Carvalho's letter stated, in part:

"While we sympathize with your apparent need for frequent use of sick leave, the district must insist upon regular attendance. When an employee is absent [from] work it directly affects our ability to plan, organize and provide quality services to the students trusted to be in our care. Significant absences affect your co-workers and result in a lack of continuity necessary for the success of the students. Your attendance is a concern and improvement in your attendance is required."

"It is the expectation of the Department that [your] attendance is improved in the future. Should it continue further disciplinary action may be taken, up to and including dismissal of employment."

(*Exh. AA8 & AA17*)

15. Mr. Lucas was again absent one day in March, one day in April, and nine consecutive days in May, 2016. (*Exh. AA9 & AA17*)

16. By letter dated June 1, 2016, Ms. Benevides again wrote to Mr. Lucas about his "excessive absences" and stated that he was expected to return to work no later than June 6, 2016 with doctor's note(s) excusing his absence since May 16, 2016, or NBSD would assume he had abandoned his position. (*Exh. AA9*)

17. Mr. Lucas returned to work, as ordered, on June 6, 2016. He provided a series of medical notes excusing his absences due to his "medical condition", not otherwise described. (*Exh. AA17 & Exh 20*)

18. Mr. Lucas was again absent on June 14, 2016 and June 16, 2016. (*Exh. AA17*)

19. By letter dated June 17, 2016, Ms. Carvalho imposed a three-day suspension upon Mr. Lucas. The disciplinary letter stated:

"The specific reason for this suspension is the result of your failure to adhere to the District's expectations as it relates to attendance. Your excessive absenteeism has been addressed for the past two years with two letters of expectation and a written warning. Despite these efforts, we have seen no signs of improvement."

(*Exh. AA10*)

20. After hearing requested by Mr. Lucas, by letter dated July 20, 2016, Ms. Emsley upheld the three-day suspension. (*Exhs. AA11 & AA12; Testimony of Emsley*)

21. This appeal duly ensued. (*Exhs. AA13 & AA14*)

22. At the Commission hearing, Mr. Lucas explained that his absences were not attributable to any single medical issue, but were due to a variety of different physical ailments. He called in sick when he knew he would be “no use”. He explained that he has started to take vitamins and was trying to stay healthier. The NBSD does not dispute that Mr. Lucas’s absences are attributable to physical ailments that he suffered. (*Testimony of Appellant; Emsley & Carvalho*)

23. After his suspension, Mr. Lucas’s attendance did show improvement. For the remainder of the 2015-2016 school year, he maintained perfect attendance. As of the Commission hearing, for the 2016-2017 school year, he had taken two personal days in September, 2016 and two six days in October. He had a positive balance in his sick leave and personal leave accounts. (*Exh. AA17*)

24. Neither Ms. Carvalho nor Ms. Emsley had ever seen a pattern of absenteeism comparable to that of Mr. Lucas. By contrast, of the two other Food Service MEOs, one had perfect attendance in the 2015-2016 school year and the other had been out a total of five (5) days. (*Testimony of Emsley & Carvalho*)

25. At the Commission hearing, Mr. Lucas pointed to several other NBSD employees whom he claimed had been treated more leniently than he had been for similar attendance issues. These other examples included:

- Employee 1 – Employee had received Letters of Expectation for the past two school years, and had been issued a verbal and written warning. The employee’s only

attendance issue in the 2016-2017 school year was a warning for one day of unexcused tardiness.

- Employee 2 – Employee received a Letter of Expectation in March 2016 and left employment with NBSD shortly thereafter.
- Employee 3 – Employee received a Letter of Expectation in February 2015 and there were no further known attendance issues with this employee.
- Employee 4 – Employee is a Cook whose issues in the 2014-2015 school year could not be specified for privacy reasons that were being addressed through other resources. The employee's attendance improved in each of the next two school years.

(Exh. 19; Testimony of Emsley)

APPLICABLE CIVIL SERVICE LAW

A tenured civil service employee may be suspended for “just cause” after due notice and hearing upon written decision “which shall state fully and specifically the reasons therefore.”

G.L.c.31,§41. A person aggrieved by a decision of an appointing authority made pursuant to G.L.c.31,§41 may appeal to the Commission under G.L.c.31,§43, which provides, in part:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority's procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

Under Section 43, the Commission makes a de novo review “for the purpose of finding the facts anew.” Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has

sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997). See also City of Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den., 726 N.E.2d 417 (2000); McIsaac v. Civil Service Comm'n, 38 Mass.App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, rev.den., 390 Mass. 1102 (1983).

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct., 359 Mass. 211, 214 (1971); City of Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102 (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928) The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

The Commission is guided by "the principle of uniformity and the 'equitable treatment of similarly situated individuals' [both within and across different appointing authorities]" as well as the "underlying purpose of the civil service system 'to guard against political considerations, favoritism and bias in governmental employment decisions.' " Town of Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. It is also a basic tenet of "merit principles" which govern civil service law that discipline must be remedial, not punitive, designed to "correct inadequate performance" and "separating employees whose inadequate performance cannot be corrected." G.L. c.31,§1.

G.L.c.31, Section 43 also vests the Commission with “considerable discretion” to affirm, vacate or modify discipline but that discretion is “not without bounds” and requires sound explanation for doing so. See, e.g., Police Comm’r v. Civil Service Comm’n, 39 Mass.App.Ct. 594, 600 (1996) (“The power accorded to the commission to modify penalties must not be confused with the power to impose penalties ab initio . . . accorded the appointing authority”)

“[T]he power to modify is at its core the authority . . . to temper, balance, and amend. The power to modify penalties permits the furtherance of uniformity and equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation, i.e., ‘to protect efficient public employees from partisan political control’ . . . and ‘the removal of those who have proved to be incompetent or unworthy to continue in the public service’ [Citations]”

Id., (*emphasis added*). See also Town of Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006), quoting Watertown v. Arria, 16 Mass.App.Ct. 331, 334 (1983).

ANALYSIS

The NBSD has established by a preponderance of evidence that it had just cause to impose discipline upon Mr. Lucas for a continuing pattern of excessive absences that substantially impaired the efficiency of the public service. Indeed, the NBSD actions leading to the three-day suspension involved here represent a classic example of appropriate progressive and remedial discipline designed to rectify inadequate performance. Indeed, the significant change to Mr. Lucas’s attendance record immediately following the suspension imposed reinforces the conclusion that the NBSD’s actions were not only justified but effective to their purpose.

First of all: “At the risk of stating the obvious, attendance is an essential function of any job.” Rios-Jimenez v. Principi, 520 F.3d 31 (1st Cir. 2008) and cases cited. The NBSD is not required to continue to tolerate an employee, for the indefinite future, who has demonstrated an unacceptable level of unreliability in his/her ability to report to work. This is especially true

when the employee is a part of a team that has a time-sensitive and critical mission of providing public school students with meals each school day.

Indeed, the NBSD showed appropriate, sound judgment in how it handles the sensitive issue of employee absenteeism, adopting a process that affords employees ample opportunity to address the NBSD's concerns and, where appropriate, seek assistance when the absences require accommodations. Employees start each school year with a clean slate. When absenteeism reaches a problematic level, the first step is the issuance of a non-disciplinary "Letter of Expectations", followed, in turn, by verbal and written warnings. Suspension is imposed only after these intermediate steps have been used without success. It is hard to envision a process that, in general, and as applied to Mr. Lucas, more appropriately meets the intent of "basic merit principles" of remedial discipline.

Mr. Lucas argues that he was only told that he was "expected" to "improve" his attendance, but claims that the NBSD had no specific attendance standards, never quantified its "expectations", and never gave him any specific personal targets that would relieve him from the risk of further sanctions. As to the claim that NBSD had no general attendance standards, I disagree. The acceptable range of absences for sickness was expressly negotiated and set forth in the CBA, along with specific provisions to reward those who hewed to those standards. As to the lack of specific personal targets, I agree that the NBSD might well find it useful to be more explicit in a particular situation. This case, however, is not one in which the Commission should intervene to fine-tune the well-designed process that the NBSD had chosen to put in place.

Mr. Lucas seems to believe that his "improvement" from a 52% attendance rate after receiving his March 8, 2016 warning to a 75% rate thereafter, made the three-day suspension punitive and not remedial. This argument overlooks the critical fact that, between the March 8,

2016 warning and the suspension in June, Mr. Lucas had failed to show up for work at all from May 18, 2016 until ordered back on June 6 , 2016, and was absent a total of 17 days during that three month period, which is almost a third more absences than the CBA sick leave accrual provides for the entire school year. The NBSD was fully justified to believe that Mr. Lucas knew or should have known that such a level of continued absence was not what the NBSD expected to show improvement. I do not find anything about the other employees identified by the Appellant to suggest he received any disparate treatment.

Finally, I note that this is not a situation in which Mr. Lucas has been penalized for seeking an accommodation for his absenteeism. The NBSD did not suspend him for failing to justify his absences, but because of the unacceptably high level of absenteeism in the aggregate. The NBSD indicated that it is willing to work with any employee who needs accommodations, requires an extended, defined, leave of absence, or who needs resources to help conform their attendance to acceptable standards. Mr. Lucas is regarded by the NBSD as a good employee whom the NBSD wants to continue in employment if the attendance problem can be solved. Due to Mr. Lucas's limited work record, he does not qualify for FMLA leave and has not identified any accommodations or resources that would rectify his attendance problem.

CONCLUSION

Accordingly, for the reasons stated, the appeal of the Appellant, Jerrold Lucas, under Docket No. D-16-129 is *dismissed* and the three-day suspension is affirmed.

Civil Service Commission

/s/ Paul M. Stein

Paul M. Stein
Commissioner

By vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein & Tivnan, Commissioners) on May 11, 2017.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(1), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L. c. 31, § 44, any party aggrieved by a final decision or order of the Commission may initiate proceedings for judicial review under G.L. c. 30A, § 14 in the superior court within thirty (30) days after receipt of such order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of the Commission's order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d).

Notice to:

Phillip Brown, Esq. (for Appellant)

Jane Medeiros Friedman, Esq. (for Respondent)